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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 771

ROSEMONT ENTERPRISES, INC.,
Petitioner,

against

RANDOM HOUSE, INC. and JOHN KEATS,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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This brief is submitted on behalf of respondents Random House, Inc. and John Keats in opposition to the petition of Rosemont Enterprises, Inc. (hereinafter referred to as "Rosemont") for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit entered in this action on August 17, 1966.*

* Although Rosemont in its introductory prayer and throughout the body of its petition refers to the matter to be reviewed as "the judgment", the record demonstrates that what we are dealing with is a determination of the United States Court of Appeals for the Second Circuit upon an appeal, pursuant to Section 1292(1) of the Judiciary Code, from an interlocutory order granting a preliminary injunction. Also, at p. 50 of Appendix B to the petition, Rosemont reprints the order of the Second Circuit here at issue under the heading "Judgment of Court of Appeals".

Opinions Below

The opinion of the District Court granting the injunction is printed in Appendix A to the petition and is reported at 256 F. Supp. 55 (S.D.N.Y. 1966). The decision of the Court of Appeals reversing the District Court is printed in Appendix B to the petition and is reported at 366 F. 2d 303 (C.A. 2, 1966).

Questions Presented

1. Was the Second Circuit in error in determining "that there is considerable doubt as to whether the copyrighted and paraphrased matter (in defendants' book) constitutes a material and substantial part" of the articles whose copyrights were assigned to Rosemont immediately prior to the institution of this litigation?

2. Was the Second Circuit in error in determining that "there has not been a clear showing of probable success of the trial with respect to the extent and quality of infringement of the (copyrighted) Look articles which warrants the granting of a preliminary injunction"?

3. Is the defense of fair use in copyright available only for scholarly works written and prepared for scholarly audiences or works not motivated in any part by a desire for commercial gain?

4. Is reasonable reference to and reliance upon prior copyright published material by an author in order to save time and effort permitted under the Copyright Law?

5. Were "the possibilities of injury present and potential to the respective parties" correctly weighed in determining whether a preliminary injunction was proper?

6. Should a preliminary injunction be granted against publication of a book protected by the First Amendment to the Constitution in the absence of a showing by the plaintiff of a "right, both legal and factual, in most unequivocal terms"?

7. Are unclean hands a ground for denial of a preliminary injunction?

8. Can a person who has acquired a copyright solely to suppress the work of another, use that copyright to enjoin that work?

Statement of the Case

Rosemont's statement of the case completely flouts this Court's rule that such a statement should contain "the facts material to the consideration of the questions presented." Rule 23.1(e). Thus, in the Second Circuit, Chief Judge J. Edward Lumbard, in an opinion in which he was joined by Judge Paul R. Hays, held that the conduct of Rosemont and Howard Hughes, the person whom that opinion found to be in control of Rosemont, constituted unclean hands and precluded Rosemont from obtaining the equitable relief of a preliminary injunction. Two of the three questions which Rosemont in its petition contends are presented by this case concern the conclusions emanating from the findings of Chief Judge Lumbard's opinion that Rosemont is controlled by Hughes and that Rosemont has been used in an attempt to suppress defendants' book. But Rosemont's statement of the case never refers to any of the material in the record upon which Chief Judge Lumbard based his determination. Rosemont merely states that "The Court of Appeals assumed that Rosemont was controlled by Hughes—notwithstanding

that Hughes is neither an officer, director nor stockholder of Rosemont—and that Rosemont was engaged in an effort to protect Hughes' privacy against invasion by the Random House book" (petition p. 8). Thus Rosemont's truncated statement of the case is designed to convey the impression that the Court below assumed facts which had absolutely no basis in the record. In actuality, Chief Judge Lumbard's opinion sets forth a number of uncontradicted facts which led up to his conclusion. All we need to set the record straight in this regard is to quote the findings of Chief Judge Lumbard annotated with references to the support for these findings in the record (all references will be to defendants' appendix, hereinafter referred to as "A").

> "By June, 1965, Hughes had learned that Random House intended to publish a full length biography about his life. Through Gregson Bautzer, his California lawyer, Hughes told Bennett Cerf, Random House's chief executive, that he opposed its publication. He further informed Mr. Cerf that if Random House did not decide against its publication, Hughes, by means of his great resources could and would cause endless trouble. (A-65a).
>
> Rosemont claims that on July 2, 1965 Hughes entered into an agreement with it whereby he gave to Rosemont the sole and exclusive right to publish his life story.[1] (A-64a-67a) In any event, on September 16, 1965, Rosemont was incorporated, listing as its sole shareholders, a retired Hughes Tool Co. executive, a present Hughes Tool Co. executive, and Chester Davis, Hughes' New York lawyer (A-52a). There is ample factual basis in

1. There would seem to be some question as to exactly when this agreement was entered into as it was not acknowledged until September 27, 1965.

the record to demonstrate that Rosemont was dominated by Hughes himself: employees of his wholly owned Hughes Productions open Rosemont's important mail (A-55a), answer its telephone (A-55a), and perform clerical and computer work for Rosemont, all without charge (A-56a). In addition, Rosemont's part-time research man has testified that he takes his orders from a Hughes Tool Co. executive (A-55a).

On September 29, Chester Davis contacted Mr. Cerf and informed him of the Hughes-Rosemont agreement (A-63a, 70a-71a). This was at Bautzer's suggestion (A-58a-59a; 70a). Thereafter, on February 17, 1966, Rosemont instituted a suit against Random House in the New York State courts, claiming a violation of its exclusive right to publish a Hughes biography (A-51a). Despite the apparent frivolous nature of the claim, extensive discovery proceeding followed in which Random House opened its files to Rosemont (A-72a). At about the same time Bautzer again called upon Mr. Cerf and told him that Hughes would make it 'financially worthwhile' to Random House and the author to discontinue the Biography. In addition, notwithstanding the Hughes agreement with Rosemont, he offered Hughes' cooperation in the publication of an 'authorized' biography by Random House. When Cerf asked what assurances could be given, he stated that Hughes would be willing to pay a penalty if such cooperation were not forthcoming (A-69a).

During March, 1966, a dozen advance galley proofs of the biography were sent by Random House to leading magazines and newspapers for review purposes. Rosemont acquired a copy through unknown channels (A-60a). Thereafter, Rosemont commenced negotiations with Cowles Communica-

tions, Inc., the publisher of Look Magazine, to obtain the copyright to the 1954 Look magazine articles.

Affidavits by Gardner Cowles, the chief executive of Cowles Communications, and by an executive vice-president of Cowles state: (1) that the assignment was requested only after Cowles failed to indicate whether it would take copyright action against Random House; (2) that such assignment was requested in order that the copyrights might be used in negotiation with Random House to prevent further distribution of the book,[2] and (3) that the copyrights could not be assigned to Hughes, they were told, since that might force Hughes to appear at a deposition. The affidavits further state that Hughes' lawyers admitted during the negotiation that Rosemont was merely a Hughes-controlled company and that Hughes was very upset about Random House's intended publication (A-196a-200a).

On May 20, 1966, Cowles and Rosemont entered into an agreement; Cowles assigned the copyrights in return for obtaining a right of first refusal on a serialization of Rosemont's Hughes biography, if and when it is ready for publication. The agreement continued, showing Hughes' interest in the copyright as it was recognized by the parties in the agreement:

> 'We [Rosemont] agree that with reference to the assignment of copyrights or material given us by you we will not assign such copyrights to any person, firm or corporation other than Howard Hughes, or any corporation owned or controlled by him, or to our stockholders, provided Howard Hughes consents thereto.' (A-41a)

2. True Magazine in April, 1966 printed a condensed version of the Random House biography. Cowles took no action against this publication.

Six days later, on May 26, 1966, Rosemont commenced this action in the district court (A-59a 60a).

Nor were Rosemont's efforts to stop publication of material about Hughes confined to Random House. During this same period, Lyle Stuart, Inc., a New York publisher, commissioned author Ezra Goodman to write a Hughes biography. Following this, on November 22, 1965, Goodman then entered into two agreements with Rosemont. First, Goodman agreed not to submit any material to his publisher unless it was first cleared with Rosemont. Under this contract Goodman's lawyer received $4,250. In a second agreement of the same date, Rosemont agreed to pay Goodman $38,250 purportedly for Goodman's unpublished manuscript of the life of D. W. Griffith. Rosemont thereafter rejected the manuscript on Hughes.[3] Thus, nothing came of Lyle Stuart's attempts to publish a biography of Hughes.[4] (A-57a-58a)

The implications from all of the above facts are obvious. Hughes wanted nothing written about himself, the publication of which he could not control. The Rosemont Corporation was created to this end. The purchase of the Look copyright was a part of Hughes' plan to prevent the publication of a biography.[5]"

3. It was agreed by Goodman and Rosemont that any disputes arising from the contract would be submitted to binding arbitration by Perry Lieber, a public relations man for Howard Hughes and the Hughes Tool Company. He also found the manuscript unpublishable.

4. Sometime after the Rosemont-Goodman arrangements, Lyle Stuart, Inc. commenced an action in the Supreme Court, New York County against Rosemont Enterprises, Howard Hughes, Gregson Bautzer, Chester C. Davis and Perry Lieber.

5. Rosemont Enterprises, Inc. has subsequently acquired the copyright to THE HOWARD HUGHES STORY by Adela Rogers St. John, an article which appeared in the American Weekly Magazine dated April 13, 1947 (A-116a-117a; 161a-162a).

Rosemont is not content with distorting and truncating the facts in the record. It must also completely misstate the holding of the Court below. A reading of that Court's opinion will find that the Court's decision rests upon many grounds, any one of which would have been sufficient basis for vacating the preliminary injunction granted by the District Court. But Rosemont chooses only to present three of the bases for the Second Circuit opinion. Omitted are a number of other bases particularly those which involve questions of discretion and factual analysis, types of questions which this Court generally leaves to the courts of appeal and the district courts. Thus we submit that the following four bases for the Second Circuit determination have been totally omitted from Rosemont's presentation of the case.

1. A determination "that there is considerable doubt as to whether the copied and paraphrased matter (of the Random book) constitutes a material and substantial portion of "the Look articles." (App., p. 33).

2. A determination that there has not been a "clear showing of probable success at a trial with respect to the extent and quality of infringement of the Look articles which warrants the granting of a preliminary injunction."* (App., p. 34).

* In this connection Rosemont's footnote at p. 6 is totally misleading. It indicates no conflict between the District Court's finding that "what was taken from the Look articles was substantial in both a qualitative and quantitative sense" and the Second Circuit opinion. In actuality the Second Circuit specifically held that there was considerable doubt as to this finding by the District Court. Each of the 41 instances of alleged copying referred to in Rosemont's footnote were treated in detail in defendants' brief before the Second Circuit and this analysis was not contradicted by Rosemont in its brief. The clear finding that Rosemont has not demonstrated sufficient material and substantial copying to justify the granting of a preliminary injunction indicates that the Second Circuit did not accept Rosemont's alleged parallels.

3. A determination that "in deciding whether a preliminary injunction should be granted possibilities of injury present and potential to the respective parties must be considered and weighed" (App., p. 43) and that such weighing of the equities herein require denial of a preliminary injunction.

4. A determination that in order to obtain a preliminary injunction against publication of a book the movant must show "a right, both legal and factual, in most unequivocal terms." (App., p. 44).

Any of these four reasons would justify the reversal of the preliminary injunction. If the Court of Appeals was right in any of these four determinations then this Court need not reach the questions alleged by Rosemont to be presented by this action in its petition.

As we have indicated above, this is an appeal from an interlocutory order. Subsequent to the determination of the Second Circuit, additional proceedings were had herein in the United States District Court for the Southern District of New York. Specifically, Rosemont made a motion under Rules 12 and 56 of the Federal Rules of Civil Procedure to dismiss the counterclaims alleged against it, Howard Hughes, Gregson Bautzer and Rosemont's three officers, directors and stockholders. (This motion is now awaiting decision by District Judge Edward Weinfeld.) As part of its moving papers Rosemont submitted affidavits from Mr. Bautzer and Mrs. Lola S. Lea, an attorney associated with Chester C. Davis, an officer, director and stockholder of Rosemont. We submit that the affidavits of Mr. Bautzer and Mrs. Lea further substantiate the conclusions of Chief Judge Lumbard. But in any event, these affidavits were not part of the record

before the Second Circuit and will not be before this Court if it chooses to grant the petition for a writ of certiorari herein.

Reasons for not Granting the Writ

I.

Rosemont has not shown why it should be granted the extraordinary right of interlocutory review by this Court.

Rosemont has carefully tried to hide the fact that it is seeking review of an interlocutory determination of the United States Court of Appeals. Nowhere in Rosemont's petition is there any discussion of why an interlocutory decision by this Court is called for in this action. There is no reason advanced why this Court's review cannot be postponed until final determination of the action on the merits. Accordingly, this Court's statement in *Denver* v. *New York Trust Co.*, 229 U. S. 123, 133 (1913), controls:

> "The exceptional power to review, upon certiorari, a decision of a Circuit Court of Appeals rendered on an appeal from an interlocutory order is intended to be and is sparingly exercised."

The wisdom of this statement is clearly demonstrated by this case. Before the period for filing a petition for a writ of certiorari has passed, additional proceedings have taken place which have resulted in the uncovering of new evidence supporting the determination of the Second Circuit. Presumably as time goes by and additional motions are made, witnesses are deposed and finally a trial is had, still further evidence will be adduced casting new light on this action. But all of this will be unavailable to

this Court if it chooses now to grant review. A delay until a final judgment will allow this Court to make its determination upon a full and complete record.

II.

The order of the Court below is supported on numerous grounds not now challenged by Rosemont.

We have indicated above the details of the Second Circuit's determination. Here Rosemont has petitioned this Court to hear this case because it involves what it considers to be three important questions which should be resolved by this Court. But none of these questions need be considered by this Court. This Court could sustain the determination below on any one of the four grounds indicated earlier. None of these four grounds was mentioned by Rosemont in its petition. An examination of these grounds indicate why.

Thus the Second Circuit determination is based upon its finding that there is not clear proof of material and substantial copying. A review of this determination would mean simply an application of well-settled principles of copyright law to the particular works in question. Obviously, there is no need for review by this Court of such an issue.

The Second Circuit determination is also supported by its balancing of the equities. That Court believed that the relative harm caused defendants by a preliminary injunction outweighed any possible harm to Rosemont by the lifting of the preliminary injunction. Such balancing of the equities has been done in multitudes of cases by hundreds of different courts. It would be a waste of this

Court's time to require it to consider whether the equities were properly balanced in a particular preliminary injunction motion.

Thus what Rosemont is asking this Court to do is to review an order sustained by determinations it does not even question in its certiorari petition because it contends that some of the alternate grounds for the Court's holding were erroneous. We submit that this is not the function of a writ of certiorari.

III.

The controverted determinations of the Second Circuit are based upon well established principles of law.

Rosemont does advance three determinations by the Second Circuit which it contends are erroneous and which require this Court's review. In each case, however, the Second Circuit's determination is well supported by established principles of law.

A. Free Speech.

Rosemont's first contention is that the Second Circuit erred when it considered the policy of free speech embodied in the First Amendment to the Constitution in determining the rights of a copyright holder. Rosemont's assertion that free speech should not be considered by a court in any context is breathtaking in its audacity. Rosemont has cited the case of *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), where this Court held that free speech limits *state* common law actions for libel. It also referred to the case of *Time, Inc.* v. *Hill*, now pending before this Court, in which this Court is trying to balance

free speech with a *state* court's protection of the right of privacy. In copyright cases, however, since we are dealing with a purely federal right, the federal courts are free to consider the free speech implications of their determination in adjudging the exact metes and bounds of copyright protection.

But putting the obvious importance of free speech in all contexts to one side, copyright protection is always limited by the Constitutional authority for all copyright legislation. Thus Article I, Section 8 Clause 8 of the United States Constitution gives Congress the power to pass copyright and patent legislation in order "to promote the Progress of Science and useful Arts". This provision has been relied upon to determine the scope of copyright protection. *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 158 (1948), *Berlin* v. *E. C. Publications, Inc.*, 329 F. 2d 541, 543-4 (2d. Cir.), *cert. denied*, 379 U. S. 822 (1964). As Chief Judge Lumbard pointed out, there is no occasion to use the copyright laws clearly "designed to protect interests of quite a different nature" in order to allow someone to interfere "with the public's right to be informed regarding matters of general interest".

Clearly, therefore, the Second Circuit has simply followed the well established principle that any limitation upon free speech must be rigidly limited even in the case of well-recognized exceptions. As this Court stated in *Roth* v. *United States*, 354 U. S. 476, 488 (1957):

> ". . . The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."

At this late date the proposition that free speech should be considered in all cases involving the publication of a book hardly needs review by this Court.

B. Unclean Hands.

Rosemont also contends that this Court should review the Second Circuit's determination that Rosemont's unclean hands deprive it of the right to a preliminary injunction. The principle of unclean hands is a long established one in equity and has been recognized as grounds for denying an injunction by numerous courts in a number of different contexts. Obviously, such a well-settled proposition need not be reviewed by this Court.

Rosemont's petition also asserts that the Second Circuit decision limits a copyright holder's right to a preliminary injunction. Throughout this discussion, Rosemont talks as if the granting of a preliminary injunction is a routine remedy readily available to any copyright holder. We need not belabor the well established proposition that any preliminary injunction is an extraordinary remedy which courts have been traditionally reluctant to grant. As the Second Circuit opinion herein points out, this reluctance is particularly heightened where the object sought to be enjoined is a book enjoying the protection of the First Amendment.

Chief Judge Lumbard's discussion of the facts which we have quoted in the statement of the case indicates that Rosemont's contention that its "motive is not reflected by conduct" (Petition p. 11) is completely vitiated by the record in this case.

C. Fair Use.

Rosemont also brings into question the Second Circuit's discussion of the Fair Use doctrine. First, it con-

tends that the Court below establishes a new standard for the application of that doctrine by its holding that the Fair Use defense is not restricted to scholarly works written for scholarly audiences or works in no way motivated by a desire for commercial gain. In fact all the Second Circuit did was to articulate the clear holding of numerous other decisions. Thus Judge Moore in his opinion stated:

> "The fair use privilege has been applied without question to other publications which have obviously been motivated in part by a desire for economic gain. See Holdredge *v.* Knight Publishing Co., 214 F. Supp. 291 (S.D. Cal. 1963) (article in popular magazine); Eisenschiml *v.* Fawcett Publications, 246 F. 2d 598 (7th Cir. 1957) (article in popular magazine); Toksvig *v.* Bruce Publishing Co., 181 F. 2d 664 (7th Cir. 1950) (popular biographical novel); Huie *v.* National Broadcasting Co., 184 F. Supp. 198 (S.D.N.Y. 1960) (commercial television program); Oxford Book Co. *v.* College Entrance Book Co., 98 F. 2d 688 (2d Cir. 1938) (history study outline)." (App. 38)

Other examples could be cited: *Berlin* v. *E. C. Publications, Inc.*, 329 F. 2d 541 (2d Cir. 1964) (parodies in a popular humor magazine); *Mathews Conveyor Co.* v. *Palmer-Bee Co.*, 135 F. 2d 73 (6th Cir. 1943) (commercial catalog); *Greenbie* v. *Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957) (a popular novel); *Karll* v. *Curtis Pub. Co.*, 39 F. Supp. 836 (E.D. Wisc. 1941) (an article in a popular magazine); *Broadway Music Corp.* v. *F-R Pub. Corp.*, 31 F. Supp. 817 (S.D.N.Y. 1940) (an article in a popular magazine). Indeed, the classic statement of the Fair Use principle in *Samson & Murdock Co.* v. *Seaver-Radford Co.*, 140 Fed. 539, 541 (1st Cir. 1905) recognized that

the Fair Use doctrine applied to "the arts and sciences using those words in the broadest sense". All of these cases, therefore, stand for the proposition articulated by the Second Circuit that the Fair Use doctrine is available to a work "whether an author or publisher reaps economic benefits . . . or whether its publication is motivated in part by a desire for commercial gain, or whether it is designed for the popular market".

While the Second Circuit herein specifically refused to follow the District Court opinion in *Loew's Inc.* v. *Columbia Broadcasting System,* 131 F. Supp. 165 (S.D. Cal. 1955), aff'd upon new opinion, 239 F. 2d 532 (9th Cir. 1956), aff'd by an equally divided court, 356 U. S. 43 (1958), it based this refusal on its prior refusal to follow that precedent in *Berlin* v. *E. C. Publications, Inc., supra.* In that instance this Court refused to grant a writ of certiorari, 379 U. S. 822 (1964). There is no reason now for this Court to review the same Second Circuit position it refused to review in the *Berlin* case.

Rosemont also contends that the Second Circuit discussion of Fair Use is in conflict with the decision of the Seventh Circuit in *Toksvig* v. *Bruce Pub. Co.,* 181 F. 2d 644 (7th Cir. 1950). Rosemont would read that case as prohibiting any use of the copyrighted material in order to save time or effort in doing research. This is obviously not the holding of the *Toksvig* case. This was recognized by the Seventh Circuit itself in a subsequent case, *Eisenschiml* v. *Fawcett Publications,* 246 F. 2d 598 (7th Cir. 1957) in which that court quoted *Toksvig* and held that under the standards laid down by that decision, the work in question which extensively relied upon the copyrighted work of another was not in violation of the copyright laws. An examination of the *Toksvig* and

Eisenschiml decisions indicates that the Seventh Circuit is in full agreement with the Second Circuit that some use of others' research work is permitted.

Rosemont's petition is eloquent in its denunciation of what it considers to be "an emasculation of the protection of individual creative effort accorded by copyrights" (petition p. 16). But this eloquence is based upon a total misreading of the Second Circuit opinion. That opinion takes pain to indicate that there is no *absolute* prohibition against using the research of another to save time and effort, but that as in all cases of Fair Use the question is one of reasonableness. Thus the Second Circuit stated:

> ". . . The point simply is that 'the second historian or second directory publisher cannot bodily appropriate the research of his predecessor.' Huie *v.* National Broadcasting Co., 184 F. Supp. 198, 200 (S.D.N.Y. 1960). The fair use privilege is based on the concept of reasonableness and extensive verbatim copying or paraphrasing of material set down by another cannot satisfy that standard. See Holdredge *v.* Knight Publishing Co., 214 F. Supp. 921, 924 (S.D.N.Y. 1963); see Benny *v.* Loew's Inc., 239 F. 2d supra, at 536. See also MacDonald *v.* DuMaurier, 144 F. 2d 696, 701 (2d Cir. 1944)." (App. 43)

On this point, the opinion is but a restatement of well established copyright law.

Also well established is the proposition that in considering the extent of copyright protection the constitutional purposes of all copyright legislation should be considered. We have pointed out at p. 13 above that this principle has been recognized by this Court in *United States* v. *Paramount Pictures, supra* and subsequently by the Second Circuit in *Berlin* v. *E. C. Publications, Inc., supra.*

The Second Circuit's determination on Fair Use is not in conflict with the proposed revision of the Copyright Statute recently reported favorably by the House of Representatives' Committee on the Judiciary. Although section 107 of the House bill codifies the Fair Use doctrine, the Committee Report specifically states in that regard:

> "Section 107, as revised by the committee, is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way" (House of Representatives, 89th Cong., 2nd Session, Report No. 2237 p. 61 (1966)).

Thus the proposed bill merely provides a statutory basis for the prior case law on Fair Use including the decision herein.

Thus at all points the issues which Rosemont contends are presented by this case are nothing more than restatements of well established principles of law. Even were we to forget the two incontestable facts that we are dealing with an interlocutory decision with a necessarily incomplete record and that the opinion below is amply supported by at least four grounds which Rosemont does not even seek to present to this Court, the soundness of the authorities supporting the Second Circuit decision on the controverted points requires the denial of Rosemont's petition.

CONCLUSION

For all the reasons stated herein we submit that the petition for a writ of certiorari be in all respects denied. In addition, we submit that "since there appears to be no grounds for granting such a writ" and in view of Rosemont's truncated treatment of the record and the opinion of the Court below, this Court award reasonable damages to respondents under the provisions of Rule 56.4 of the Rules of this Court.

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